IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR

..

:: **O R D E R** ::

Tikam Singh Vs. State & Ors.

S.B. CIVIL WRIT PETITION NO.6111/2005.

Date of Order :: 8th MAY 2006

PRESENT

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. Vineet Jain, for the petitioner.
Mr. H.R. Soni, Additional Government Advocate.
Mr. Mahesh Bora, for the respondents.

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REPORTABLE BY THE COURT:

INTRODUCTORY

The petitioner-accused, facing trial for offences under Sections 302, 201 IPC and Section 3(2)(v) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 ('the Act of 1989'/'the Act' hereafter) has submitted this writ petition questioning the legality and validity of the order dated 16.06.2005 (Annex.4) issued by the Collector-cum-District Magistrate, Pali appointing the respondent No.3 Shri Mahesh Bora, Advocate to conduct the case on behalf of the State at the request of the complainant

with reference to Rule 4(5) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Rules, 1995 ('the Rules of 1995'/'the Rules' hereafter).

THE FACTS: A RÉSUMÉ

The petitioner Tikam Singh has been challaned on 17.05.2005 for the offences aforesaid and he contends that the complainant has foisted a frivolous case on account of political enmity and is motivated by political opponents of his father. The complainant-respondent Nos.4 and 5 submitted an application (Annex.2) before the Collector-cum-District Magistrate, Pali for appointing a counsel for pleading the case on their behalf as per Rule 4(5) of the Rules of 1995. The application was accompanied by the consent stated by Shri Mahesh Bora (Annex.3) and the Collector, acting on the application, appointed Shri Bora to plead the case on behalf of the State by the impugned order dated 16.06.2005 (Annex.4).

Before the Special Court, to whom the matter was committed on 22.07.2005, the petitioner moved an application (Annex.1) on 22.09.2005 and contended that Shri Bora, Advocate is regularly conducting the case on behalf of the complainants and pleaded their case before the Additional Chief Judicial Magistrate, Jaitaran but deliberately did not file

Vakalatnama. The petitioner contended while referring to the Act and the Rules that Shri Bora having been a counsel for the complainants could not have been engaged as a Public Prosecutor for this case. However, the Special court turned down such objection of the petitioner by the order dated 30.09.2005(Annex.5) with the observations that whether Shri Bora's appointment was regular or not, it could not be a matter of dispute nor that court was competent to pass any order on such dispute.

The petitioner has submitted this writ petition questioning the legality and validity of the order dated 16.06.2005 passed by the learned Collector-cum-District Magistrate, Pali with the submissions that the order is clearly beyond the authority and power of the District Magistrate; and the Public Prosecutor or the Special Public Prosecutor could be appointed only by the State.

Separate replies to the writ petition have been submitted, by the State and by Mr.Bora. The State in its reply has submitted, inter alia, that engagement of a counsel is in the exclusive domain of the client and the Advocate; that the Act of 1989 has independently given latitude or power to the victim or his family member to make a request for appointment of special counsel and in case that request is acceded to by the District Magistrate, such order calls for no interference; and that it was premature to question or

presume that the Special Public Prosecutor would not act in accordance with law while discharging his duties. However, the State in its reply has ultimately left it for this Court to consider whether the appointment of Mr. Bora to conduct the trial should be continued or not.

Shri Bora in his reply has firstly taken serious exception to the allegations of his deliberately not marking the attendance or concealing the fact of his engagement by the complainant. Shri Bora has placed on record a certified copy of his Vakalatnama filed before the Additional Chief Judicial Magistrate, Jaitaran as Annexure R.3/1 and has contended that there was no question of concealment of his such engagement. On the questions involved in the case, it has been contended that the Collector-cum-District Magistrate has independent power to appoint lawyer of the choice of the complainant as Special Public Prosecutor and this power is not in supersession of the provisions of the Act of 1989. It has also been contended that vires of the provisions of Rule 4(5) of the Rules of 1995 have not been challenged; and, existing the Rule, his appointment as Special Public Prosecutor cannot be challenged.

RIVAL SUBMISSIONS

Learned counsel for the petitioner Mr. Vineet Jain, while referring to Sub-section (8) of Section 24 of the

Code of Criminal Procedure ('the Code' hereafter) has strenuously contended that the so-called Special Public Prosecutor could be appointed only by the Central Government or the State Government, as the case may be, for the purposes of any case or class of cases, and that too an Advocate having practice of not less than 10 years. Learned counsel submitted that so far Rule 4(5) of the Rules 1995 is concerned, that only deals with engagement of an eminent Senior Advocate if so deem necessary by the District Magistrate or the Sub-Divisional Magistrate or if so desired by the victims of atrocity; on such payment of fees as the concerned Magistrate may consider appropriate and such is only an engagement necessarily for the purpose of conducting the case of or on behalf of the alleged victims and it cannot be equated with appointment of a Special Public Prosecutor as contemplated by Section 15 of the Act of 1989. Learned counsel referred to and relied upon the decision of the Hon'ble Supreme Court in Shiv Kumar Vs. Hukum Chand & Anr. : 1999 Cr.L.R. (SC) 689 to submit that the role of Public Prosecutor is entirely different than the role of a lawyer engaged for and by a party and by the very nature of the peculiar duties, the conduct of prosecution cannot be handed over to a counsel engaged by the complainant. Learned counsel also referred to the decision of this Court in Madho Singh & Anr. Vs. State of Rajasthan & Ors.: 2002(1) Cr.L.R.

(Raj.) 498 to contend that a lawyer who was counsel for the complainant could not have been appointed as Public Prosecutor and for appointment of Special Public Prosecutor, special reasons have to be assigned. Learned counsel also referred to the decision of the Hon'ble Supreme Court in Commissioner of Income Tax Vs. East West Import & Exports (P) Ltd.: A.I.R. 1989 SC 836 and submitted that when different expressions are used by the legislature they express different intention and the material word "engaged" as used in sub-rule (5) of Rule 4 is not without significance and such engagement is not akin to appointment of a Public Prosecutor.

Per contra, learned counsel Mr. Mahesh Bora arguing for himself and for the contesting respondents, firstly distinguished the decisions cited by learned counsel for the petitioner with the submissions that such decisions relate to the cases under the Code of Criminal Procedure and would have no application to the special enactment like the Act of 1989 and the Rules thereunder which have overriding effect on anything to the contrary. Mr. Bora vehemently contended that the interpretation as suggested on behalf of the petitioner by reading sub-rule (5) of Rule 4 in isolation cannot be countenanced and for proper construction of the Rule and its area of operation, the entire scheme of the enactment is required to be kept in view and proper interpretation could be

had only by comprehensive reading of all the relevant provisions. Learned counsel submitted that so far complainant is concerned, he could have even otherwise engaged a lawyer for conduct of his case and there was no necessity for making separate provision for such engagement under sub-rule (5) of Rule 4. Learned counsel emphatically contended that the Rule is not contrary to the enactment nor its vires have been challenged and the Rule in its operation clearly provides for appointment of a special prosecutor at the request of the victims of atrocities and in view of it being a social welfare legislation, in order to give effect to the real meaning and purport of sub-rule (5), it has been provided with overriding effect with non-obstante clause. On the principles of interpretation, Mr. Bora submitted with reference to the decision of the Hon'ble Supreme Court in Amrendra Singh Vs. Tejbahadur Prajapati & Ors. : A.I.R. 2004 S.C. 3782 that restricted or wide meaning could be provided to the words in the context they are used and the object sought to be achieved; and particularly when the object of the legislature is to confer protection on weaker sections, even an extended or stretched meaning could be given. Learned counsel also referred to the decisions of the Hon'ble Supreme Court in Godawat Pan Masala I.P.Ltd. Vs. Union of India: A.I.R. 2004 S.C. 4057, Shiv Shakti Co.op Housing Society Vs. M/s. Swaraj Developers & Ors.: A.I.R. 2003 S.C. 2434,

D. Saibaba Vs. Bar Council of India & Ors. : A.I.R. 2003 S.C. 2502, Union of India Vs. Rajiv Kumar: A.I.R. 2003 S.C. 2917, State of Orissa & Ors. Vs. Joginder Patjoshi & Anr. : 2003 AIR SCW 6686 dealing with parameters of liberal construction on a beneficial legislation and on various principles of statutory interpretation that the statute must be read as a whole; attempt must be made to harmonise different provisions; a casus omissus cannot be supplied by the court except in case of clear necessity; and a construction rendering the provision nugatory is required to be avoided. Learned counsel also referred to the decision of this Court in Phool Singh Vs. State of Rajasthan & Ors: 1993 (2) R.L.R. 77 to contend that payment of fees to the Special Public Prosecutor by the complainant has been held to be neither unjust nor unfair. Learned counsel submitted with reference to another decision of this Court in Kalu Singh & Ors. Vs. State of Rajasthan: 1998(2) R.L.W. 1070 that when Special P.P. was appointed by the Collector under Section 15 of the Act that was upheld by this Court requiring no interference with the observations that it was a pleasure of the Government to appoint anyone as Special Public Prosecutor. Learned Additional Government Advocate Mr. H.R. Soni submitted, while supporting the submissions of Mr. Bora, that Rule 4(5) extend an additional liberty to the complainant other than that available under Sections 301 and 302 of the Code. Mr. Soni

submitted that on a comprehensive reading of sub-rule (5) of Rule 4 with the context, it is apparent that the person engaged under sub-rule (5) is engaged to conduct the case, that is to conduct prosecution, and any other interpretation would frustrate the purpose and render nugatory the Rule itself.

Learned counsel Mr. Vineet Jain rejoined with the submissions that in Kalu Singh's case, the appointment of Special Public Prosecutor was made under Section 15 of the Act; and this Court relying on the statement made before the court, upheld such appointment as having been made by the State Government with reference to a notification, though not produced. Learned counsel submitted that Rule 4 essentially deals with supervision of prosecution and for that purpose, for a complainant of the case under SC/ST Act, a lawyer could be engaged, but if at all conducting the case, he would be conducting the case of the complainant only and not conducting the prosecution.

During the course of submissions, learned counsel Mr. Bora candidly submitted that he was counsel for the complainant in this case and this particular fact was never avoided or concealed; and the allegations that such engagement was sought to be concealed seem to be the creation of imagination of the accused. Learned counsel referred to the certified copy of Vakalatnama (Annex. R.3/1) filed by him on behalf of the complainant before the Additional

Chief Judicial Magistrate, Jaitaran. Mr. Bora submitted that being a counsel for the complainant is not a disqualification for being appointed as Special Public Prosecutor particularly in the scheme of the Act of 1989 and the Rules thereunder which are intended specifically to protect the weaker sections.

Relevant provisions

From the rival submissions, fundamentally it is the area of operation of sub-rule (5) of Rule 4 of the Rules of 1995 that calls for interpretation in the present case. However, for the purpose of its true interpretation, the relevant provisions of the Act of 1989, the Rules of 1995 and so also of the Code may be taken note of at the first.

The preamble of the Act of 1989 reads as under:-

> "An Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto."

Some of the relevant definitions as contained in Section 2 of the Act read as under: -

> **"Section 2(b) – "Code"** means the Code of Criminal Procedure, 1973 (2 of 1974);
>
> **Section 2 (d): "Special Court**" means a Court of Session specified as a Special Court in section 14;
>
> **Section 2(e): "Special Public Prosecutor"** means a Public Prosecutor specified as a Special Public Prosecutor or an advocate referred to in section 15;
>
> **Section 2 (f) –** Words and expressions used but not defined in this Act and defined in the Code or the Indian Penal Code (45 of 1860) shall have the meanings assigned to them respectively in the Code, or as the case may be, in the Indian Penal Code."

Other provisions of the Act, of Sections 14, 15, 20 and relevant part of Sections 21 and 23, so far necessary for the present case may also be noticed as under:-

> **"Section 14: Special Court.**– For the purpose of providing for speedy trial, the state Government shall, with the concurrence of the Chief Justice of the High Court by notification in the Official Gazette, specify for each district a Court of Session to be a special Court to try the offences under this Act.
>
> **"Section 15: Special Public Prosecutor**. – For every Special Court, the State Government shall by notification in the Official Gazette, specify a public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years as a Special Public Prosecutor for the purpose of conducting cases in that Court.

"Section 20: Act to override other laws. – Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law.

"Section 21: Duty of Government to ensure effective implementation of the Act. – (1) Subject to such rules as the Central Government may make in this behalf, the State Government shall take such measures as may be necessary for the effective implementation of this Act.

(2) In particular, and without prejudice to the generality of the foregoing provisions such measures may include,-

(i) the provision for adequate facilities, including legal aid, to the persons subjected to atrocities to enable them to avail themselves of justice;

(ii) the provision for traveling and maintenance expenses to witnesses including the victims of atrocities, during investigation and trial of offences under this Act;

(iii) the provision for the economic and social rehabilitation of the victims of the atrocities;

(iv) the appointment of officers for initiating or exercising supervision over prosecutions for the contravention of the provisions of this Act;

(v) the setting up of committees at such appropriate levels as the State Government may think fit to assist that Government in formulation or implementation of such measures;

(vi) provisions for a periodic survey of the working of the provisions of this Act with a view to suggesting measures for the better implementation of the provisions of this Act;

(vii) the identification of the areas where the members of the Scheduled Castes and the

> Scheduled Tribes are likely to be subjected to atrocities and adoption of such measures so as to ensure safety for such members.
>
> (3) xxx
> (4) xxx
>
> **Section 23: Power to make rules–** (1) The Central Government may, by notification in the Official Gazette, makes rules for carrying out the purposes of this Act.
>
> (2) xxx"

The Central Government has framed the Rules as contemplated by Section 23 of the Act known as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995. In these Rules provisions have been made for precautionary and preventive measures as well as for supervision of prosecution and submission of reports and about the manner of information and investigation and of setting up of SC/ST protection cells, appointment of special officers, allowances and facilities to the victims of atrocities, his dependents and witnesses etc. etc. Rule 4 thereof reads thus,-

> **"4. Supervision of prosecution and submission of report.-** (1) The State Government on the recommendation of the District Magistrate shall prepare for each District a penal of such number of eminent Senior Advocates who have been in practice for not less than seven years, as it may deem necessary for conducting cases in the Special Courts. Similarly, in consultation with the Director of Prosecution/in-charge of the Prosecution, a panel of such number of Public Prosecutors as it may

deem necessary for conducting cases in the Special Courts, shall also be specified. Both these panels shall be notified in the Official Gazette of the State and shall remain in force for a period of three years.

(2) The District Magistrate and the Director of Prosecution/in-charge of the Prosecution shall review at least twice in a calendar year, in the months of January and July, the performance of Special Public Prosecutors so specified or appointed and submit a report to the State Government.

(3) If the State Government is satisfied or has reason to believe that a Special Public Prosecutor so appointed or specified has not conducted the case to the best of his ability and with due care and caution, his name may be, for reasons to be recorded in writing, denotified.

(4) The District Magistrate and the Officer-in-charge of the prosecution at the District level, shall review the position of cases registered under the Act and submit a monthly report on or before 20th day of each subsequent month to the Director of Prosecution and the State Government. This report shall specify the actions taken/proposed to be taken in respect of investigation and prosecution of each case.

(5) Notwithstanding anything contained in sub-rule(1) the District Magistrate or the Sub-Divisional Magistrate may, if deem necessary or if so desired by the victims of atrocity engage an eminent Senior Advocate for conducting cases in the Special Courts on such payment of fee as he may consider appropriate.

(6) Payment of fee to the Special Public Prosecutor shall be fixed by the State Government on a scale higher than the other panel Advocates in the State."

The Code of Criminal Procedure, 1973 being an enactment to consolidate and amend the law relating to criminal procedure provides for trial of offences under its Section 4 as under:-

> **"4. Trial of offences under the Indian Penal Code and other laws.**- (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
>
> (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Section 2(u) of the Code defines Public Prosecutor thus,-

> **"2(u).**- "Public Prosecutor" means any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor."

Section 24 of the Code of Criminal Procedure provides for appointment of the Public Prosecutor and Additional Public Prosecutor by the Central Government or the State Government, as the case may be, for every High Court and every District; Sub-section (7) thereof providing for eligibility conditions for a person to be appointed a Public

Prosecutor and Sub-section (8) dealing with appointment of Special Public Prosecutor read thus, -

> **"Section 24(7).** A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (l) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.
>
> **"Section 24(8).** The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

Chapter XVIII of the Code dealing with the topic of "Trial before a Court of Session", mandates in Section 225 thus,-

> **"Section 225. Trial to be conducted by Public Prosecutor**.- In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor."

Other relevant provisions of Section 301 of the Code could also be noticed thus, -

> **"Section 301. Appearance by public prosecutors**.- (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.
>
> (2) If in any such case any private person instructs a pleader to prosecute any person in

> any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case."

Trial under the Act of 1989 and its nature

Adverting to the questions involved in this case, the nature of trial in a case relating to the Act of 1989 may be considered. The Hon'ble Supreme Court in the case of Gangula Ashok Vs. State of Andhra Pradesh : A.I.R. 2000 SC 740 has clarified the operation of the provisions of the Act of 1989 in the context of trial of offences. The question therein of course arose in the manner that a charge sheet was straightway filed to the Special Court envisaged under the Act of 1989 and it was questioned that the Special Court had no jurisdiction to take cognizance of any offence without the case having been committed to that court. The Hon'ble Supreme Court found that the Special Court is a Court of Session and the mandate of Section 193 of the Code of Criminal Procedure would stand in its way in taking cognizance directly without the case being committed. After dealing with Section 14 of the Act of 1989, the Apex Court was pleased to find that the Act contemplates only the trial to be conducted by the Special Court but it continues to be

essentially a Court of Session; and trial in such a Court could be conducted only in the manner provided in Chapter XVIII of the Code. The Hon'ble Supreme Court held, -

> "Hence the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. **The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code** which contains a fasciculus of provisions for "Trial before a Court of Session".
>
> (emphasis supplied)

The Hon'ble Supreme Court has been pleased to observe further with reference to Section 4(2) of the Code that if other enactment contains any provision which is contrary to the provisions of Code, such other functions would apply in place of the particular provision of the Code; and if there is no such contrary provision, then the provisions of the Code would apply to the matters covered thereby. With reference to the Act of 1989, the following observations of the Hon'ble Andhra Pradesh High Court in the case of Referring Officer Vs. Shekar Nair: 1999 (3) Andh.LT 533 have been quoted with approval by the Hon'ble Supreme Court,-

> "As already observed by us, in the absence of a particular procedure prescribed by the said Act as regards the mode of taking cognizance, enquiry or **trial, the procedure under the Code**

> **will have to be applied by reason of Section 4 (2) of the Code** as clarified by the Supreme Court in the case of Directorate of Enforcement, AIR 1994 SC 1775."
>
> (emphasis supplied)

It is, therefore, apparent that for the Act of 1989 not providing for any particular procedure for trial, the procedure under the Code would apply; of course it would remain subject to the proviso that if there be anything inconsistent in the Code, the Act would override by virtue of its Section 20.

Special Court and Special Public Prosecutor:

Section 14 of the Act of 1989, as noticed hereinbefore, provides for specifying of a Court of Session for each District to be Special Court to try the offences under the Act. By virtue of Section 15 of the Act, for the purpose of conducting the cases in every such Special Court a Special Public Prosecutor is appointed. Such appointment comes by way of notification in official gazette but two modes are provided: One, of the State Government specifying a Public Prosecutor as a Special Public Prosecutor; and Second, by appointment of an Advocate having not less than 7 years practice as a Special Public Prosecutor.

Reading of Section 15 of the Act of 1989 in conjunction with Section 225 of the Code makes it clear that the trial before the Special Court is of course by a Public Prosecutor but he is a Special Public Prosecutor having been entrusted conduct of cases in that Special Court. He remains nevertheless a Public Prosecutor and, obviously would be subject to responsibilities of the high and unique office of a Public Prosecutor that has distinctive and incomparable duties.

The difference in the meaning of the same phrase “Special Public Prosecutor” in the context of the Act of 1989 and in the context of Code of Criminal Procedure may also be noticed. The Special Public Prosecutor under Section 15 of the Act could be an Advocate having practice of not less than 7 years. The same is the requirement under sub-section (7) of Section 24 of the Code of Criminal Procedure for a person to be eligible to be appointed as Public Prosecutor or Additional Public Prosecutor. But then, for a Special Public Prosecutor to be appointed under sub-section (8) of Section 24 of the Code, he has to be an Advocate who has been in practice for not less than 10 years.

Therefore, the Special Public Prosecutor under Section 15 of the Act is equivalent and akin to the Public Prosecutor under Section 24 of the Code (and not the Special Public Prosecutor as envisaged by Section 24(8) of the

Code); and that is why a Public Prosecutor already appointed could be "Specified" as Special Public Prosecutor under Section 15 of the Act.

Public Prosecutor: his role

A Public Prosecutor holds an unrivaled position and has a public element attached to his office; he represents not the Police but the State. A Public Prosecutor discharges his duties not as a representative of the complainant but as a representative of the State; and the State has its interests and obligations to the entire society, every component of it, including the accused. The role of a Public Prosecutor has been clearly contra-distinguished from the role of a private counsel representing the complainant/victim; and the Hon'ble Supreme Court has been pleased to declare the law in no uncertain terms in Shiv Kumar's case (supra) thus,-

> "14. From the scheme of the Code the legislative intention is manifestly clear that **prosecution in a sessions Court cannot be conducted by any one other than the Public Prosecutor.** The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. **The expected attitude of the Public Prosecutor while conducting the prosecution must be couched in fairness not only to the Court and to the**

> **investigating Agency but to the accused as well.** If an accused is entitled to any legitimate benefit during trial, the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court, if it comes to his knowledge. **A private counsel if allowed free hand to conduct prosecution would focus on bringing the case to conviction. That is a reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."**
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> (emphasis supplied)

Role of complainant in the matters of appointment of Public Prosecutor

A Division Bench of this Court in the case of Bhopal Singh Vs State of Rajasthan & Ors.: 2001 Cr.L.R. (Raj.) 161 has re-emphasized that in all prosecutions, the State is the prosecutor and the complainant has no independent right to have guilty persons punished. While explaining the scheme of Sections 225, 301 and 302 of the Code, the Division Bench has pointed out that the complainant has also been given limited right to speak during trial by way of submitting written arguments under Section 301(2) of the Code and assist the Public Prosecutor through private counsel with permission of the Court if the facts so permit. This Court observed,-

> "Thus, the foundation of Secs. 225, 301 & 302 of the Code of Criminal Procedure is a well reasoned public policy. A balance is struck between public interest and private interest that while keeping the Management of the prosecution with Public Prosecutor, provision is made to take care of complainant's view, on legal and factual aspect."

Sub-section (8) of Section 24 has made a provision for appointment by the appropriate Government, for the purposes of any case or class of cases, a person who has been in practice as an Advocate for not less than 10 years, as a Special Public Prosecutor. When appointment of Special Public Prosecutor is sought to be resorted to at the instance of the complainant, having regard to the limited role of the complainant in the matters of criminal trial, this Court in the case of Madho Singh (supra) has summed up the principles governing such appointment of Special Public Prosecutor that it could be made only for special reasons; and only when public interest so demands. This Court held, -

> "31. In view of the settled legal position as explained above, **the appointment of the Public Prosecutor cannot be automatically on the application of the complainant.** There have to be **special reasons** which should be recorded in writing as to why deviation from the General Rules is made appointing the Special Public Prosecutor. The application has to be properly examined by the authority and on being satisfied on the basis of the material on record, the Special Public Prosecutor can be appointed.

> Without application of mind, if an order is passed it may amount to arbitrariness. **Such appointment can be made only and only when public interest so demands.**"
>
> (emphasis supplied)

Appointment at the instance of victim of atrocities and Operation of the Rules of 1995:

Before embarking on the operation of the provisions of Rule 4 of the Rules of 1995, it could be usefully recapitulated and noticed with comprehensive examination of the provisions of the Act of 1989 that in keeping with the objects sought to be achieved, of taking measures to prevent commission of offences of atrocities against the members of Scheduled Castes and Scheduled Tribes, and to provide for Special Courts for speedy trial of such offences, provisions have been made for Special Courts and Special Public Prosecutors for such Courts. However, it would not be a correct perception of its scheme if it be assumed that the Act of 1989 seeks to provide also for a special trial. The trial is of course by the Special Court and prosecution is to be conducted by the Special Public Prosecutor; but, as explained by the Hon'ble Supreme Court in Gangula Ashok (supra), it would nevertheless be the trial before a Court of Session governed by Chapter XVIII of the Code.

The principal enactment, that is the Act of 1989, does not make any provision for any appointment, by whatever name or designation called, as a substitute for the Special Public Prosecutor appointed under Section 15 of the Act. In other words, there is no provision, which provides for or contemplates appointment of an “Extra Special Public Prosecutor” or “Special Special Public Prosecutor” for conducting the trial of cases before the Special Court. Therefore, if at all for any case at the instance of the complainant such a replacement by way of “Special Special Public Prosecutor” is sought to be brought about, that could only be with reference to Section 24(8) of the Code; and then, the principles of Madho Singh’s case would directly apply. Such appointment can be made only by the State Government; only when public interest so demands; and cannot be automatic on the application of the victim/complainant.

The Rules of 1995 framed by the Central Government under Section 23 of the Act purport to cover substantial part of measures required to be taken by the State Governments so as to make the working of the enactment effective and to achieve its objects. Under Section 21 of the Act special duty has been cast on the Government to ensure effective implementation of the Act and the State Governments are required to take measures for adequate

facilities, including legal aid to the victims and one such requirement is of appointment of officers for initiating or exercising supervision over prosecutions for contravention of the provisions of the Act.

It could be noticed from the heading of Rule 4 of the Rules of 1995 that it is intended to provide for supervision of prosecution and submission of report. Sub-rule (1) of Rule 4 provides for preparation of two panels by the State Governments for conducting the cases in special courts: one being of such number of eminent senior advocates who have been in practice for not less than seven years; and second is the panel prepared in consultation with Director Prosecution of such number of public prosecutors as may be found necessary. Sub-rule (2) requires the District Magistrate and Director Prosecution to review twice a year the performance of Special Public Prosecutors. Under sub-rule (3) the State Government may denotify the name of any such Special Public Prosecutor on being satisfied or having reasons to believe that he has not conducted the case to the best of the ability and with due care and caution.

While sub-rules (1), (2) and (3) of Rule 4 of the Rules of 1995 deal with appointment, performance appraisal and even removal of Special Public Prosecutors; however, sub-rule (4) and sub-rule (5) of Rule 4 operate in different arena. Sub-rule (4) enjoins upon the District Magistrate and

the Officer-in-charge of the Prosecution to review the position of cases registered under the Act and to submit a monthly report to the Director (Prosecution) and to the State Government specifying the actions taken/proposed to be taken in respect of investigation and prosecution of different cases. Sub-rule (5) operates notwithstanding anything contained in sub-rule (1); and thereby the District Magistrate or the Sub-Divisional Magistrate, if deem necessary or if desired by victims, engage an eminent Senior Advocate for conducting cases on such payment of fees as considered appropriate.

It is at once evident that sub-rule (4) and sub-rule (5) are not relatable to Section 15 of the Act and instead, they operate to achieve the objectives of various clauses of sub-section (2) of Section 21 for taking measures for effective implementation of the Act.

Examined in the light of the scheme of the enactment, this court is of view that sub-rule (1) of Rule 4 is intended to give effect to the provisions of Section 15; and sub-rule (5) of Rule 4 is basically intended to provide for the measures as required by clause (i) of sub-section (2) of Section 21 and for that matter even clause (iv) of sub-section (2) of Section 21. The meaning is absolutely clear. An eminent senior advocate could be “engaged“ by the District Magistrate or Sub-Divisional Magistrate if considered

necessary or if desired by the victims for conducting case in the special court, on such payment of fees as might be thought proper by the concerned Magistrate; and such engagement could be resorted to notwithstanding Special Public Prosecutor being available for that court; but obviously such 'engaged' lawyer would be conducting the case in the aid or assistance of the Special Public Prosecutor. He could do so and can assist; but in any case, he cannot prosecute.

To be true to its standing and to be operative in its true sense, sub-rule (5) of Rule 4 could only be referred to Section 21 of the Act and could be resorted to in order to facilitate engagement of Senior Advocate if considered necessary by the concerned Magistrate or if so sought by the victim. Such engagement could definitely be resorted to so as to ensure extending adequate aid to the alleged victims of atrocities so that they are able to secure justice for themselves. The Rule operates to this extent only and cannot be interpreted as a substitute or as an exception or proviso to Section 15 of the principal Act; it could be for extra help, vigil or aid to and in the prosecution but cannot be for the purpose of providing a substitute for Public Prosecutor. This Court is clearly of opinion that if sub-rule (5) of Rule 4 were read as a proviso to Section 15 of the Act, it would be disturbing the structure of the Act of 1989 and would be reading a provision

in the Act as if providing for substitution of the Special Public Prosecutor, though never so incorporated in the enactment.

When a substitute Public Prosecutor is not envisaged by the statute and on the contrary, the mandate of the enactment is that the trial before the Special Court would be conducted by Special Public Prosecutor specified or appointed under Section 15, this court is unable to countenance the submission that the Special Public Prosecutor could yet be substituted by way of engagment of an advocate by an Executive Magistrate only.

This Court is clearly of opinion that if the Rule goes beyond what the Act contemplates; the Rule must yield to the Act. Any Rule to be valid, must have a nexus with any of the statutory functions entrusted to the Rule making authority and else it would be struck down, as ruled by the Hon'ble Supreme Court in V. Sundeer Vs. Bar Council of India: (1999) 3 SCC 176 and Indian Council of Legal Aid Vs. Bar Council of India : (1995) 1 SCC 732.

The submissions of Mr.Bora that vires of sub-rule (5) have not been challenged do not carry any relevance inasmuch as the said sub-rule is relatable to Section 21 of the Act and, therefore, cannot be said to be ultra vires the Act. However, the submissions that this sub-rule in its operation provides for appointment of a Special Prosecutor at the request of the victims of atrocities are not

correct. The sub-rule does not provide for substitution of the Special Public Prosecutor obviously because the enactment itself does not provide so.

The interpretation suggested by Mr. Bora that because of non-obstante clause in sub-rule (5), a special provision has been made for a Prosecutor to be appointed irrespective of the panel prepared under sub-rule (1) is not well founded. A non-obstante clause in the rule could only operate to the extent it is intended to be and a bare reference to the language of sub-rule (5) makes it clear that in order to facilitate its true operation and to ensure engagement of a counsel (if considered proper by the District Magistrate or if desired by the complainant), along side the Special Public Prosecutor, that a non-obstante clause has been inserted; making sub-rule (5) operative irrespective of sub-rule (1). However, such engagement by the District Magistrate has never been intended to be over and above the State Government “specifying” or “appointing” the Special Public Prosecutor under Section 15 of the Act of 1989. If the non-obstante clause in the sub-rule is attempted to be read as an independent provision operating over and above the provision of principal enactment itself, needless to comment that the Rule to that extent would be invalid and inoperative. This non-obstante clause is required to be read, interpreted and

understood in the context and for the purpose it has been made.

This court is clearly of opinion that the principles of interpretation of non-obstante clause when applied to the context of the present rule, it would clearly mean that so far the contrary or inconsistent provisions in sub-rule (1) are concerned, only that much are to be ignored; as sub-rule (5) would have overriding effect on them. Practically the result obtainable from this non-obstante clause is only to the effect that sub-rule (5) gets delinked from sub-rule (1) and operates on its own. However, this sub-rule (5) cannot cut down or expand the ambit and scope of the principal enactment itself. Howsoever liberally construing the same and even after giving extended and streached meaning to the phraseology of sub-rule (5), as argued by Mr. Bora with reference to Amrendra Pratap Singh's case, this Court is clearly of opinion that an interpretation cannot be put where this sub-rule (5) may be read as making an independent provision over and above the principal enactment itself. The entire Rule 4 along with all its clauses would nevertheless remain subject to the principal enactment and cannot override Section 15 of the Act.

There is yet another strong reason for which the interpretation as suggested by Mr.Bora and Mr.Soni that sub-rule (5) provides for engagement of a counsel to conduct prosecution cannot be accepted. The Act contemplates

prosecution to be conducted by a Special Public Prosecutor to be specified or appointed, as the case may be, by the State Government by notification in gazette. Even under the scheme of the Code, the Public Prosecutor is appointed by the concerned Government. There is no authority with the Executive Magistrate to directly appoint a Public Prosecutor under the Act. The prosecution being essentially by the State and prosecutor being appointed by the State, an Executive Magistrate cannot be acceded an independent power to appoint a prosecutor when the enactment does not contemplate so.

That sub-rule (5) of Rule 4 does not intend to provide for a Public Prosecutor could be noticed from another feature that such engagement does not refer to the number of years of practice, though the Code makes such provision in Section 24 for Public Prosecutor and Special Public Prosecutor and even Section 15 of the Act also requires such minimum number of years of practice for an Advocate to be appointed as a Special Public Prosecutor. Of course and obviously the phrase “Senior Advocate” occurring in sub-rule (5) does not refer to the designated Senior Advocate under the Advocates Act; but the omission of minimum number of years of practice and then specific change of phraseology of “engagement” in place of “appointment” as employed by sub-rule (5) cannot be ignored as insignificant.

If the interpretation as suggested by Mr.Bora and Mr.Soni were accepted it would lead to an anomalous position that the provision that were intended to extend fullest State support to the victims of atrocities would be converted into permitting the victims becoming prosecutors too. It remains fundamental that the offence is against the State and prosecutor is the State and not the alleged victim. The learned District Magistrate in the present case has straightway proceeded to appoint Mr. Mahesh Bora as a prosecutor for the State at the request of the victims. The engagement under Rule 4(5) of the Act calls for no question; any eligible Advocate could be engaged if deem fit by the District Magistrate, and he could be engaged to conduct the case to the extent his engagement would permit; but he cannot prosecute.

The submissions of Mr. Bora that the complainant could have even otherwise engaged his counsel and for that purpose, there was no necessity of making the provisions in the Rules is not correct for the reasons: First, that sub-rule (5) extends State help and support to the victim and the Advocate therein is engaged by the concerned Magistrate on such fees as considered appropriate; and secondly, such engagement could be resorted to by the concerned Magistrate himself, if considered necessary. Obviously, the provision is intended to ensure effective

working and operation of the Act; but is not intended to provide a complainant's prosecutor.

LEGALITY AND VALIDITY OF THE ORDER DATED 16.06.2005:

It is not in dispute that in the present case the complainants have moved application (Annex.2) to the District Magistrate on 07.06.2005 with reference to Rule 4(5) of the Rules of 1995 stating that they have a right to have the matter prosecuted by a Senior counsel of their choice and, therefore, it was prayed that Shri Mahesh Bora may be appointed as Public Prosecutor. Learned counsel Shri Bora has also stated in his consent letter dated 07.06.2005 (Annex.3) that he was ready to conduct the case on behalf of the complainants at their request but then stated that,-

> "अत: मेरी और से सहमति पेश कर निवेदन है कि माफिक परिवादी पक्ष के निवेदन पर मुझे पब्लिक प्रोसिक्यूटर नियुक्त किया जावे ।"

The learned Collector-cum-District Magistrate, Pali has proceeded to pass the impugned order dated 16.06.2005 (Annex.4) at such request and consent thus,-

> "उपरोक्त प्रकरण में प्रार्थी सावंलराम एंव सतकीदेवी पत्नि स्व. श्री मोहनलाल मेघवाल के आवेदन पत्र तथा आप के द्वारा प्रेषित प्रस्ताव दि.

7.6.05 पर विचार कर आप को सम्पूर्ण प्रकरण में निर्णय होने तक रूपये 5000/- पैरवी फीस पर नियुक्त करने का निर्णय लिया गया है ।

अत: आप राज्य की ओर से आगामी तारीख पेशी पर न्यायालय में उपस्थित हो कर पेरवी प्रारंभ करे । निर्णय होते ही अपील किये जाने अथवा नहीं किये जाने के संबध में विस्तृत आधार सहित राय इस कार्यालय को शीघ्र भिजवावे ।"

The learned Special Judge has proceeded to observe that Shri Mahesh Bora had been appointed by the Collector, Pali and whether such appointment was regular or not, could not be a point of controversy in this case nor on such dispute that court was competent to pass any order.

This Court is clearly of opinion that having regard to the scheme of the Act and the Rules, the application as made by the complainants and the consent as stated by Mr. Bora and the order as made by the Collector-cum-District Magistrate, do not stand in conformity with the requirements of law. Engagement of Shri Bora or any counsel for that matter under Rule 4(5) of the Rules of 1995 could not have been in substitution of the Special Public Prosecutor already appointed in the said Special Court under Section 15 of the Act. Rule 4(5) does not envisage such substitution of the Public Prosecutor.

In the aforesaid view of the matter, the order dated 16.06.2005 (Annex.4) cannot be sustained and deserves to be quashed.

However, it needs to be made clear that to the extent permissible by Rule 4(5) of Rules of 1995, the application moved by the complainants dated 07.06.2005 could still be considered by the District Magistrate and engagement of Shri Bora or any counsel for that matter conforming to the other requirements of law could be resorted to and this order shall not be of any impediment in that regard.

In the facts and circumstances of this case, it is also required to be noticed that the trial has already got delayed because of the dispute raised about engagement of Shri Bora as Public Prosecutor and, therefore, it shall be in the fitness of things if the learned Special Judge would consider taking up this trial on priority and proceed with the same expeditiously.

A comment:

Before concluding, this Court is constrained to comment on the conduct of the petitioner in raising an irresponsible plea in his application (Annex.1) that Shri Bora has not filed Vakalatnama for the complainant and in leveling allegations that there was a premeditated plan whereunder Shri Bora did not mark his attendance malafide. Challenging the appointment of Shri Bora as Prosecutor on the principles of law is a matter entirely different; but the contents of the

application are indiscreet and are in bad taste apart from being wholly incorrect. By way of such an application imputing motives on a counsel without any basis and squarely contrary to the record, needs to be deprecated. Learned counsel appearing for the petitioner before this Court has rightly not harped upon such allegations which turn out to be more of imagination and rather in an over-anxiety to thwart the appointment of Shri Bora. This Court has not countenanced the appointment of Shri Bora as Prosecutor under Rule 4(5) of the Rules of 1995 but leveling of such reckless allegations by the petitioner-accused on the opponent's counsel is strongly disapproved. However, having regard to the circumstances of the case, this Court would leave the matter at that only.

CONCLUSIONS:

As a result of the discussion aforesaid this writ petition succeeds and is allowed to the extent indicated above. The impugned order dated 16.06.2005 (Annex.4) is quashed and set aside. The learned District Magistrate, Pali shall be free to pass appropriate fresh orders on the application moved by the complainants in accordance with law. However, for the purpose of passing of such order, the trial of the case would not be delayed and the learned Special

Judge shall consider taking up the trial on priority and proceed with the same expeditiously. There shall be no order as to costs of this writ petition. Record be returned back immediately.

(DINESH MAHESHWARI), J.

//Mohan//